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OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Carriage of the Transmissions)	CS Docket No. 98-120
of Digital Television Broadcast Stations)	
)	
Amendments to Part 76 of the Commission's Rules)	
)	
TO: The Commission)	

**REPLY COMMENTS OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.**

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SUMMARY

Digital television has long been envisioned as a replacement service for the public's current analog service. To put teeth into the transition to digital, Congress mandated that broadcasters give back their analog spectrum in 2006, or whenever the transition is sufficiently far along. Congress also charged the Commission with managing the transition in the public interest. Since the early 1990's, the Commission has sought comment on DTV implementation rules, and since then, it has adopted rules on build-out, simulcasting, hours of operation; the list goes on. One of the most fundamental set of implementation issues involves cable carriage of DTV signals. In recognition of their importance, the Commission asked for comment on those issues as early as 1991, and in 1992, Congress set guidelines for the core regulatory principle and the schedule. Now it is time – indeed it is past time – for the Commission to abide by the Congressional mandate and adopt appropriate rules.

The Congressional cable carriage directive was clear as to timing: initiate the cable carriage rulemaking proceeding when the DTV transmission standard is adopted (almost two years ago to the day). Congress' sense of urgency, which has seemingly been forgotten, was unmistakable. Congress was also clear as to the principle: adopt a must-carry rule for digital television.

The broadcast/cable marketplace has never been a “free marketplace” – not with compulsory licenses, spectrum allocations, and heavy reliance by both services on radio frequencies licensed to them by the federal government. Under the regulatory environment in existence at the time the must-carry rules were adopted, cable systems could pick up and retransmit broadcasters' programming, at little or no cost and without broadcaster consent, and move their signals from large city to small hamlet at the risk of

destroying the bedrock values of localism that underlie Section 307(b) of the Act – ubiquitous and community-oriented service available to rich and poor, urban and country dweller alike.

In the analog environment, the Commission, Congress and the courts all embraced a series of regulations that promoted the growth of cable but sought as well to preserve the public's local television service from cable-induced erosion. That was at a time when cable was a smaller industry and policy makers were concerned about the strength of broadcasting with its reach into 98% of American homes. Yet Congress recognized even then the power and incentive of an untrammelled cable industry to undermine first smaller broadcasters and ultimately the whole system.

Today the tables have turned. Cable penetrates 70% of American homes and passes another 20%, while penetration of the sets needed to receive the replacement digital broadcast service understandably is nil. Cable's bottleneck strength is now probably the single greatest concern in the communications policy arena. Cable must-carry rules were demonstrated, to the Supreme Court's satisfaction, to be needed in the old analog environment when the shoe was on the other foot. How much more clearly are they necessary in the new digital environment?

Still, cable advocates urge delay. Wait until the patient is dead, they say to the Commission, before you administer first aid. They say: "That is what the Constitution requires." These reply comments of the Association for Maximum Service Television, Inc. ("MSTV") parse those particular arguments and demonstrate their failings. Fortunately, efforts to import into the Constitution meanings that don't make any sense rarely prevail.

It is, of course, true that how digital television will unfold is not known at this time. But that fact has not daunted or held back the Commission's efforts to establish a regulatory regime for other aspects of digital operations, subject, wisely, to periodic reviews. Further, none of the carriage rules MSTV endorses would constrain or be affected by how the digital service evolves, such as what percentage of their schedules broadcasters devote to HDTV and what percentage to multicasting, to take one area of uncertainty often cited as a reason for the Commission not to act. Non-degradation, network nonduplication, syndicated exclusivity, program guide regulation and must-carry principles can and should be established now, regardless what HDTV/multicast mix develops in response to consumer demand.

Some argue that delay is necessary to determine whether broadcasters' digital programming merits must-carry treatment. But carriage rules have never been based on the content of broadcast programming (but instead on the nature of the service – free, local and universal), and they would be constitutionally suspect if they had. Moreover, this argument neglects the fact that digital is a replacement service for the public's current analog service. Because that service has been subject to the regulatory principles at issue in this proceeding, the presumption should be to apply those principles to the replacement digital service, making adjustments as appropriate.

Cable's advocates have also confused two different concepts: the need for regulatory certainty now and the question of when the various carriage requirements should become effective. Broadcasters are, uniquely, embarked on a high-risk, high-cost (\$16 billion) transition. They need to know now which rules of the road that govern their established analog service will apply to the infant replacement DTV service, and when and

how. There is every reason for the carriage rules, other than must-carry, that MSTV's initial comments discussed in detail, to be made immediately effective. Even the cable industry, by and large, has not contested this proposition. The Commission should proceed forthwith to adopt them.

In the case of must-carry as well, rules should be adopted immediately. Markets abhor regulatory uncertainty and do not function effectively in such an environment. But the must-carry principle can take effect in stages. The keys are adoption now and an effective and fair implementation schedule over time.

Having led the 20-year struggle to give the public's free television service the opportunity to participate in advanced television, MSTV has been dismayed by the two-year neglect of the important issues at stake in this proceeding. Delay and indifference threaten the constructive industry/government partnership that has brought us to the brink of digital success – a partnership that cable started off participating in but which, sadly, it has abandoned.

MSTV recognized that the Commission's inertia was due to the confusion, noted above, between the need promptly to adopt a must-carry requirement and concern about the disruptive consequences of implementing must-carry across-the-board on day one, regardless of the circumstances in each market and of each station and system. To break the logjam so that the Commission could expeditiously resolve the whole set of carriage and compatibility issues, MSTV's Board in September voted to submit to the Commission a capacity-based, must-carry proposal. MSTV outlined that proposal on pages 51-56 of its initial comments.

Under this proposal cable systems would have to carry local digital signals when they add capacity, thereby avoiding the need to take away existing cable programming from their subscribers – this argument being the most compelling basis for cable’s opposition to must-carry. This principle would be adjusted (1) where the cable system already has converted to digital or has added substantial capacity; (2) where in the future a cable system adds capacity, places early-adopter DTV stations on its system and keeps later adopters, *e.g.*, smaller stations, off the system; and (3) where a cable system simply stalls indefinitely in adding capacity that would accommodate DTV broadcast signals. The carriage requirements would also be subject to the one-third cap contained in the analog rules and exemptions for small systems.

Various other broadcasters made specific proposals for easing the implementation requirements of the must-carry principle or more generally endorsed a flexible approach to implementation. NAB, as well as MSTV, demonstrated that the continued growth in cable’s channel capacity will make a DTV carriage requirement easily manageable in the aggregate. The implementation ideas submitted by MSTV and others assure that must-carry implementation can be managed sensibly and without hardship for all systems, whatever their particular circumstances, even in the near term.

The Commission should get on with the job.

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The Association for Maximum Service Television, Inc. ("MSTV") files these comments to respond to comments filed in this proceeding and to reiterate the pressing need for the Commission to promptly adopt rules governing cable carriage of digital broadcast signals. The Commission has the policy rationale and authority to act, and it now has a roadmap, summarized in the paragraph below, to act in a manner that is reasonable and fair to all affected parties.

The Commission faces a host of important issues in this proceeding, including issues independent of must-carry. However, the Commission may have felt stalemated by the polarity of the positions taken on the core must-carry issue. That is why MSTV has come forward with its capacity-based must-carry proposal. The capacity-based rule MSTV proposes generally would require cable operators to carry digital broadcast signals only on unused or newly-added capacity. This proposal addresses the cable industry's primary concern that digital must-carry requirements would disrupt cable programming line-ups by requiring cable systems to delete popular cable programming to

make room for digital broadcast signals. By eliminating the cable industry's major objection to digital must-carry, the capacity-based proposal frees the Commission also to move forward with the other important issues in this proceeding.

I. SWIFT ACTION IS NEEDED TO ADAPT THE CABLE CARRIAGE REGIME TO FACILITATE THE TRANSITION TO DIGITAL TELEVISION AND PRESERVE LOCAL BROADCASTING IN THE DIGITAL ERA.

A. The Commission Needs To Act Quickly.

As MSTV showed in its opening comments and its request for expedited action in this proceeding, it is extremely important that the Commission move quickly to adopt cable carriage rules for digital broadcast signals.¹ Over 40 volunteer stations have begun to broadcast digital signals, and still a critical stone in the regulatory pathway remains unlaied. The Commission must act quickly to lay this final stone, or the nation will stumble as it takes the first steps toward replacing its locally-based, universally-available analog television broadcast system with a digital equivalent.

The commenters that urge the Commission not to act attempt to draw analogies to the past: to the establishment of cable carriage rules for an existing and thriving analog television service²; to the PCS experience in which the Commission did not set standards for the new technology³; to the wholly unregulated personal computer market in

¹ See Comments of the Association for Maximum Service Television, Inc., CS Docket No. 98-120, at 16-19 (Oct. 13, 1998) ("*MSTV Comments*"); Request of the Association for Maximum Service Television, Inc. for FCC Enforcement of Existing Deadlines and Expedited Action, CS Docket No. 98-120 (Oct. 27, 1998).

² See, e.g., Comments of GTE, CS Docket No. 98-120, at 23-25 (Oct. 13, 1998) ("*GTE Comments*"); Comments of Tele-Communications, Inc., CS Docket No. 98-120, at 7-8 (Oct. 13, 1998) ("*TCI Comments*").

³ See Comments of MediaOne Group, Inc., CS Docket No. 98-120, at 19 (Oct. 13, 1998) ("*MediaOne Comments*"); Comments of Microsoft Corporation, CS Docket No. 98-120, at 19-20 (Oct. 13, 1998) ("*Microsoft Comments*").

which the hand of government has never interfered, obsolescence is rapid and marketplace penetration is relatively low.⁴ Those analogies do not work in the DTV context. The Commission's decisions in this proceeding will determine the fate of a technically new service that is designed to replace, progressively but quickly, a pre-existing, universally-available (and virtually universally-utilized) service. The transition is technically among the most complex ever attempted in terms of propagation, equipment, and coordination among industries.⁵ The service is government-mandated, not market-driven, and at the outset requires enormous broadcaster investment in return for little or no new revenue. And the replacement service must succeed by a date certain (whether 2006 or later) or the local broadcast system will be imperiled by the strain of operating dual facilities.

Several commenters suggest that the cable carriage issues are not ripe for decision because there is still too much uncertainty about what DTV services will look like, how digital equipment will function, and how consumers will respond to the new service.⁶ But the Commission has mandated the transition to the replacement service, and some rules are necessary. The Commission recently adopted rules defining the fee structure for ancillary and supplementary services, even though such services are wholly speculative at this point.⁷ It will soon issue a notice of proposed rulemaking on the public interest

⁴ See, e.g., *MediaOne Comments*, at 18-19.

⁵ See, e.g., Glen Dickson, "TV Welcomes Digital Dawn," *Broadcasting & Cable*, Nov. 23, 1998, at 42.

⁶ See, e.g., *MediaOne Comments*, at 20; *Microsoft Comments*, at 4-22; Comments of the Cable Telecommunications Association, CS Docket No. 98-120, at 2-3, 30-31 (Oct. 13, 1998) ("*CATA Comments*"); Comments of the National Cable Television Association, CS Docket No. 98-120, at 39-40 (Oct. 13, 1998) ("*NCTA Comments*").

⁷ Report and Order, In re Fees for Ancillary of Supplementary Use of Digital Television Spectrum Pursuant to Section 336(e)(1) of the Telecommunications Act of 1996, MM Docket No. 97-247 (Nov. 19, 1998); see *id.* at ¶ 22 (acknowledging that Commission had to
(continued...)

obligations of DTV licensees, even though the contours of the DTV service (*e.g.*, the extent to which broadcasters will transmit in high definition versus multiplexed channels) are not yet developed.⁸ Rules about cable carriage and digital compatibility – the infrastructure that likely will determine whether consumers ever have a chance to view DTV affordably and easily – are no less necessary than these rules; indeed, they are far more important to the success of the digital transition.

Other commenters insist that the Commission should leave it to the market to determine the pace and extent to which cable operators carry broadcasters' DTV signals. Cable operators insist that they will carry whatever digital signals consumers want to see. Recently, cable operators have pointed to the agreement between Time Warner and CBS as evidence of the market at work to bring about digital carriage.⁹ The problems with this argument are twofold.

First, when Congress enacted the *1992 Cable Act* it found that cable operators' bottleneck power renders the television market unable to function effectively to preserve free broadcasting and the multiplicity of sources of information it provides.¹⁰ This is even more so in the digital environment, where the transition to DTV is not, at least at

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make a "predictive judgment" to determine fee amount that would best serve goals of proceeding and requirements of statute).

⁸ See "Gore Commission Report Due at White House Dec. 18," *Communications Daily*, Nov. 10, 1998.

⁹ See, *e.g.*, Donna Petrozzello & Glen Dickson, "TW to CBS: Will Carry," *Broadcasting & Cable*, Dec. 14, 1998, at 6-7.

¹⁰ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 ("1992 Cable Act"), S. Rep. No. 92, 102d Cong., 2d Sess. 42, 45-46, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1175, 1178-79 ("1992 Cable Act Senate Report"); H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 75, *reprinted in* 1992 U.S.C.C.A.N. 1231, 1257 ("1992 Cable Act Conference Report").

first, market-driven and cable operators will have little incentive early in the transition to carry any digital signals other than those of the largest network stations in the largest markets. The CBS-Time Warner deal only reinforces broadcasters' concerns that without carriage requirements only large network-affiliated stations will obtain carriage for digital signals, which will not preserve a multiplicity of sources of information in the digital era. Thus, the proposed DTV carriage rules are designed to *facilitate*, rather than undermine, the functioning of the market for the distribution of DTV signals. Must-carry rules will prevent cable systems from using their bottleneck power to deny consumers access to DTV signals in order to force them to look to cable for digital services. The non-must-carry rules also promote the effective functioning of the video programming market. For example, the network nonduplication rule ensures that broadcast stations can enforce agreements that enable them to compete with their peers in their local markets rather than against large-market stations with higher advertising revenues, while the non-degradation principle prevents cable systems from unilaterally diminishing the quality of broadcasters' product.

Second, the Commission cannot rely on the functioning of the undeveloped market for a new replacement service to bring about the very conditions needed to promote the development of that market. The transition to DTV is not driven by the market; it is mandated by the government to advance the public interest in the development of advanced telecommunications sources and the efficient use of spectrum. The transition will not progress unless the demand for DTV sets increases steadily, creating the economies of scale necessary to bring down DTV set prices and generate even more demand, so that the number of consumers adopting digital technology quickly reaches the level needed to justify cutting off analog service. But demand for DTV sets will not develop unless consumers know that

there is digital programming available for viewing on the sets. Thus, to ensure that demand develops and DTV effectively replaces the analog television service by (or close to) the congressional deadline, the Commission must set some ground rules that guarantee the availability of digital signals to consumers and spur the growth of the market for DTV sets. This is what the Commission did in mandating the aggressive buildout schedule for broadcasters' digital stations, and it must finish the job by adopting rules that ensure that the digital signals transmitted by those stations reach cable subscribers.

Finally, some commenters urge the Commission to refrain from establishing digital cable carriage rules because DTV technology is rapidly evolving and regulatory "intervention" will "freeze" technology at current levels and stifle innovation.¹¹ But the rules at issue in this proceeding, which will merely define the *scope* of cable operators' obligations to carry digital broadcast signals, will not interfere with the development of technology because they will not specify *how*, as a technical matter, carriage in accordance with the prescribed requirements will take place. In fact, the adoption of digital cable carriage rules will spur the development of pro-consumer technology by providing a goal toward which equipment developers will strive.¹²

There would truly be a "freeze" in technological development only if the Commission took no action and allowed the current state of uncertainty to reign indefinitely.

¹¹ See, e.g., *MediaOne Comments*, at 16-17; *TCI Comments*, at 16-17.

¹² See Comments of Consumers Electronics Manufacturers Association, CS Docket No. 98-120 (Oct. 13, 1998) ("*CEMA Comments*") (urging adoption of cable carriage rules while promoting evolution of DTV technology); Comments of Circuit City Stores, Inc., CS Docket No. 98-120 (Oct. 13, 1998) ("*Circuit City Comments*") (supporting must-carry requirements and development of new DTV conversion technology); Comments of Harris Corporation, CS Docket No. 98-120 (Oct. 13, 1998) ("*Harris Comments*"); Comments of Zenith Electronics Corporation, CS Docket No. 98-128 (Oct. 13, 1998) ("*Zenith Comments*").

Manufacturers paralyzed by uncertainty about how digital signals will be carried on cable would be unable to move forward in the development of cable-ready DTV receivers that will offer consumers maximum flexibility in deciding how to receive digital signals. Cable operators would have little incentive to develop compatible technology to improve the efficiency with which digital broadcast signals can be carried on cable (since they may have an incentive to maintain systems as to which they can claim that carriage of digital signals would be “burdensome”). And broadcasters, uncertain about whether they will be able to obtain full HDTV carriage or carriage of multiple streams of programming and/or data, would have decreased incentives to develop HDTV production capabilities and/or alternative services.

Of course there are unknowns as the Commission ushers in this new replacement service and guides the transition from the old. Some of these are inevitable in any new service. But some are the direct consequence of the delay in the Commission’s decision-making that has already gone on far too long. It is difficult for the affected industries to address all of the technical issues involved in cable carriage of digital signals because the Commission has until recently declined to take an active role in ensuring that progress is being made toward the necessary standards for digital/cable compatibility. And the likely pace of the transition and content of the DTV service are unclear because the Commission has thus far failed to establish cable carriage rules to give broadcasters some sense of the kind of access they will have to their audiences.

In these circumstances, the Commission’s task is to make reasonable predictions concerning the necessary regulatory framework for the new service. This is the sort of task the Commission is frequently called upon - indeed is required - to undertake in

establishing rules for new services and otherwise. Most of the comments in this proceeding contain predictive judgments. Both broadcasters and cable commenters predicted increases in cable capacity. Broadcasters predicted, based on past experience in the analog context (as did Congress in enacting the *1992 Cable Act*), that some cable systems would discriminate against DTV signals in favor of cable programming. Cable systems predicted, in contrast to past evidence, that DTV consumers would purchase and install antennas and be content to rely on A/B switches to receive digital broadcast signals. The Commission must now make its own predictive judgments. But the task of crafting regulations based on predictive analyses is relatively easy here, where most of the rules in question already apply to the analog service DTV will replace and the Commission has available to it the highly relevant evidence from its analog experience. There is, in short, a solid base from which the Commission can and should complete the regulatory structure for digital television.

B. Much More Is At Stake Than Must-Carry Obligations.

In exercising the requisite judgment and adopting digital cable carriage rules, the Commission must keep in mind that much more is at stake in this proceeding than the must-carry requirement. The cable industry has suggested otherwise, implying (and sometimes explicitly stating) that the Commission need make only one decision - whether to adopt DTV must-carry rules that require all cable systems to carry all DTV signals in all markets – and if the Commission decides not to require this, then the proceeding is done.¹³

In fact, the Commission must make many more decisions than this, and on the must-carry issue it has available to it many more options. Within its broad discretion to

¹³ See, e.g. (Comments of Ameritech New Media, CS Docket No. 98-120, at 4 n.7. (Oct. 13, 1998) (“*Ameritech Comments*”).

implement Congress' objectives, the Commission must decide what type of must carry rules fairly and constitutionally implement Section 614. The Commission must make decisions that will structure marketplace negotiations not only between broadcasters and cable, but between broadcasters and networks and other program suppliers. And it must decide how to adapt for the digital environment the analog cable carriage rules that are unrelated to must-carry obligations. Finally, the FCC needs to determine what role it should play in ensuring a consumer-friendly roll-out of digital devices – a roll-out that protects consumers' access to new DTV services and preserves an even playing field for all competitors.

The non-must-carry rules at issue in this proceeding are discussed in detail in MSTV's initial comments,¹⁴ and MSTV's positions on these issues were for the most part unopposed by cable industry commenters. Among the issues addressed were network non-duplication and syndicated exclusivity; DTV signal content; non-degradation; the channel-position-related issues of channel navigation and electronic program guides; tier position; and retransmission consent elections. MSTV summarized its positions on the issues on page 57 of its initial comments, and its specific proposals were described in detail on pages 21-39. Given that the comments show little dispute on the lion's share of these issues, we urge the Commission to move forward and adopt the relatively uncontroversial positions MSTV proposed.

Only the *Adelphia Group Comments* propose an entirely different approach to the non-must-carry issues. They argue that the Commission should structure the non-must-carry rules to provide "incentives" for cable to carry digital signals. For example, they propose that the Commission exempt digital broadcast signals from syndicated exclusivity,

¹⁴ See *MSTV Comments*, at 20-44.

network non-duplication and sports blackout rules; relax rules against “cherry-picking” local stations; and allow cable operators to carry high definition broadcast signals in either 1080i or 720p format.¹⁵ The Commission should reject these proposals because they are inconsistent with the objectives of Section 614. The cable carriage regime is designed in large part to preserve the vitality of the local broadcast system, but the Adelphia Group asks the Commission both to reject any must-carry requirement for digital signals *and* to eliminate other cable rules that similarly protect broadcast localism. The network nonduplication and syndicated exclusivity rules are critical to protecting the ability of local stations to compete in and serve their markets by preventing the importation of distant signals that undermine exclusivity rights for which broadcasters have negotiated.¹⁶ The rules against “cherry-picking” preserve competitiveness and diversity in local markets. And the rules prohibiting non-degradation of broadcast signals carried on cable protect local broadcasters against anti-competitive conduct made possible by cable operators’ control over the signals carried on their systems. Exempting digital signals from these important rules would undermine the objectives that Section 614(b)(4)(B) requires the Commission to uphold, and thus would be inconsistent with the Commission’s mandate in this proceeding.

All of the decisions called for in this proceeding – guidelines to promote the development of digital compatibility standards, rules concerning how and with what protection DTV signals will be carried, and must-carry requirements – are necessary to

¹⁵ See Comments of Adelphia Communications Corp. et al., CS Docket No. 98-120, at 28-32 (Oct. 13, 1998) (“*Adelphia Group Comments*”).

¹⁶ See, e.g. *MSTV Comments*, at 21-24; Comments of Benedek Broadcasting et al., CS Docket No. 98-120, at 6-9 (Oct. 13, 1998) (“*Broadcast Group Comments*”); Comments of the National Affiliated Stations Alliance, CS Docket No. 98-120 (Oct. 13, 1998).

structure the DTV transition and support local broadcast service. Thus, the Commission should move quickly forward to adopt the necessary rules and resolve *all* of the issues involved in this proceeding.

II. THE FCC HAS THE AUTHORITY TO PROMPTLY ADOPT DIGITAL CABLE CARRIAGE REQUIREMENTS.

A. Section 614 of the Communications Act Authorizes – Indeed Obligates – the Commission to Adopt Digital Cable Carriage Rules.

As MSTV and others noted in their initial comments, the cable carriage requirement in Section 614(a) of the Communications Act applies on its face to both digital and analog broadcast signals,¹⁷ and Section 614(b)(4)(B) of the Act obligates the Commission to adapt the cable carriage rules to “ensure cable carriage” of advanced television broadcast signals:

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission *shall* initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to *ensure cable carriage* of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.¹⁸

On its face, this provision demonstrates that Congress intended the cable carriage obligations of Section 614 to apply to advanced television signals promptly after the Commission adopted the technical standards for such signals. It also shows that Congress

¹⁷ See *MSTV Comments*, at 13; Comments of National Association of Broadcasters, CS Docket No. 98-120, at 3-4 (Oct. 13, 1998) (“*NAB Comments*”); 47 U.S.C. § 534(a) (requiring cable operators to carry “signals of local commercial television stations, and qualified low power stations”).

¹⁸ 47 U.S.C. § 534(b)(4)(B) (emphasis added).

understood that the specific carriage requirements would have to be adapted to the technical characteristics of the new signals.¹⁹

Cable industry commenters object to this plain reading of Section 614(b)(4)(B) on several grounds. They contend that the provision authorizes the Commission to require carriage of digital broadcast signals only *after* the transition to digital television is complete and broadcasters have relinquished their analog spectrum and/or that it authorizes the Commission only to establish requirements related to the technical quality of digital broadcast signals carried on cable. They also insist that Congress must not have contemplated simultaneous cable carriage of analog and digital signals because dual carriage appears to them to conflict with some of the other requirements in Section 614 and could result in “disruption” of cable channel lineups. None of these arguments prevails against the clear language of the provision.

1. Section 614(b)(4)(B) And Related Caselaw Authorize Immediate Commission Action, And Subsequent Legislative Acts Make The Need For Such Action Even More Urgent.

Several cable commenters argue that because Section 614(b)(4)(B) calls on the Commission to ensure cable carriage of advanced television broadcast signals that “have

¹⁹ Given the plain meaning of Section 614(b)(4)(B), it is clear that the cable industry’s contention that digital cable carriage requirements are precluded by Section 624(f), *see, e.g., NCTA Comments*, at 7; Comments of Discovery Communications, Inc., CS Docket No. 98-120, at 32-34 (Oct. 13, 1998) (“*Discovery Comments*”), is a red herring. Section 624(f) prohibits the imposition of regulations concerning “the provision or content of cable services, *except as expressly provided in this title.*” 47 U.S.C. § 544(f) (emphasis added). Since Section 614 is in Title VI and expressly authorizes – indeed requires – the Commission to adopt regulations to ensure the cable carriage of advanced broadcast signals, Section 624(f) does not preclude Commission action in this instance. Moreover, Section 624(f) does not prohibit the Commission from looking to provisions of the Communications Act outside of Title VI, such as Sections 336 and 309(j), to improve its understanding of its obligations under Section 614. *See, e.g., MSTV Comments*, at 17-19; *NAB Comments*, at 15. (continued...)

been changed” to reflect modified standards, it allows the Commission to require carriage of digital signals only after the “change” from analog to digital television is in the past, *i.e.*, after broadcasters have returned their analog spectrum and operate only a single DTV channel.²⁰ This argument contradicts the statutory language and history and fails to take into account the circumstances in which the provision was enacted.

Congress’ use of the phrase “signals . . . which have been changed” does not limit the application of rules adopted under Section 614(b)(4)(B) only to advanced television signals that have completely supplanted analog signals. Although the verb “to change” can mean “to replace with another,” it can also mean “to make different.”²¹ And the context of the provision makes clear that the latter is the intended meaning here. A broadcaster that transmits a digital signal (along with an analog) will certainly “make” the digital signal “different” from the analog (even though it will also be transmitting the analog signal), and the “changed” digital signal should be carried under Section 614(b)(4)(B). This is clearly

(continued . . .)

The authority to regulate the carriage of digital cable signals still arises from Section 614, a provision of Title VI.

²⁰ See, e.g., *CATA Comments*, at 11-14; *GTE Comments*, at 8-9; *MediaOne Comments*, at 26-27; *NCTA Comments*, at 9-11. HBO/TBS argue that this interpretation of the provision is supported by the legislative history of Section 336(b)(3), which indicates that “the conferees [did] not intend this paragraph to confer must carry status on advanced television or other video services.” Telecommunications Act of 1996, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 161 (1996) (quoted in Comments of Home Box Office/Turner Broadcasting System, Inc., CS Docket No. 98-120, at 9 (Oct. 13, 1998) (“*HBO/TBS Comments*”)). However, the Conference Report merely explains that Section 336(b)(3) does not itself, on a self-executing basis, “confer” must carry status on digital signals. Instead, as the Conference Report recognizes, it is the responsibility of the Commission to determine how the “objectives” of Section 614 should be implemented in the digital context to “ensure cable carriage” of digital signals. *Id.* (“that issue is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act”). Thus, the legislative history of Section 336 *affirms* the Commission’s responsibility to act under Section 614(b)(4)(B); it does not authorize the Commission to abdicate that responsibility.

²¹ See Webster’s II New Riverside University Dictionary 248 (1994).

the interpretation that Congress had in mind. In the *Conference Report* accompanying the *1992 Cable Act*, the Committee explained that:

Subsection (b)(4)(B) provides that, *when the FCC adopts new standards* for broadcast television signals, such as the authorization of broadcast high definition television (HDTV), it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed *to ensure that cable systems will carry television signals complying with such modified standards* in accordance with the objectives of this section.²²

Thus, Congress intended that as soon as the Commission adopted standards for advanced broadcast signals, it would adjust the rules to ensure cable carriage of those broadcast signals then “complying with [the] modified standards,” regardless of whether signals complying with the old standards, *i.e.*, analog signals, also were broadcast and carried at the same time.

Moreover, this meaning of the phrase “have been changed” is confirmed by reference to the surrounding terms. These include the provision that requires the Commission to begin the process of making the necessary rule changes “[a]t such time” as it “prescribes” the standards for advanced television. This requires expeditious action, not delay. And Congress knew that the Commission contemplated that broadcasters would operate dual channels during a relatively lengthy transition to digital television (15 years was then planned).²³ It would make no sense for Congress to require the immediate initiation of a proceeding to “ensure cable carriage” of advanced television signals if it

²² Cable Television Consumer Protection and Competition Act of 1992, H.R. Rep. No. 862, 102d Cong., 2d Sess. 67 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1231, 1249 (“*1992 Cable Act Conference Report*”) (emphasis added).

²³ See *MSTV Comments*, at 14 (citing Second Report and Order/Further Notice of Proposed Rulemaking, In re Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, 7 FCC Rcd 3340 (1992)).

intended those rules to take effect only some ten to fifteen years into the future, after analog signals were no longer transmitted.

In addition, legislation enacted after the *1992 Cable Act* has heightened the need for the Commission to adopt digital cable carriage requirements expeditiously. In 1996, Congress enacted Section 336 of the Communications Act, which codified the Commission's policy and timetable for the recovery of analog spectrum at the end of the DTV transition.²⁴ And in the Balanced Budget Act of 1997, Congress again endorsed the Commission's policy of "loaning" DTV channels to existing broadcasters,²⁵ and set a deadline of December 31, 2006 for the return and reallocation of analog channels, unless DTV penetration is below certain levels specified in the statute.²⁶ One measure of adequate DTV penetration depends to a significant extent on cable carriage of DTV signals: the deadline for returning analog spectrum must be extended in any market in which more than 15% of television households do not subscribe to a multichannel video programming distributor ("MVPD") that carries a DTV channel for each local broadcast station and do not have a DTV receiver or digital-to-analog converter.²⁷ These provisions establish the strong governmental interest in the expeditious return of analog spectrum,²⁸ and render it virtually

²⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, § 201, 110 Stat. 56, 107-10 (codified at 47 U.S.C. § 336(c)).

²⁵ Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a)(1), 111 Stat. 251, 258 (1998) (to be codified at 47 U.S.C. § 309(j)(2)(B)) ("*1997 Budget Act*") (precluding Commission from auctioning spectrum for digital channels).

²⁶ *1997 Budget Act*, § 3003, 111 Stat. at 265 (to be codified at 47 U.S.C. § 309(j)(14)).

²⁷ *Id.*, 111 Stat. at 265-66 (to be codified at 47 U.S.C. § 309(j)(14)(B)(iii)).

²⁸ *1997 Budget Act*, H.R. Rep. No. 149, 105th Cong., 1st Sess. 569-572 (1997) (explaining that reclaimed analog spectrum will be allocated for public safety use or to commercial users by means of competitive bidding that is expected to yield receipts nearing \$4 billion).

impossible to accomplish a successful DTV transition within the contemplated timeframe without prompt carriage of digital signals on MVPDs serving a significant portion of U.S. television households, *i.e.*, cable systems.

Moreover, it is clear that the Commission has the authority to adopt regulations governing the digital service without waiting to develop the kind of detailed factual record that Congress compiled when it enacted the *1992 Cable Act*. The *1992 Cable Act* record justifies the adoption of digital cable carriage rules to at least the same extent that it supported the analog requirements, and the Commission need not wait for the development of facts specific to the digital experience.

In the course of challenging the constitutionality of digital must-carry, several cable industry commenters argue that the First Amendment analysis should be governed by *Quincy Cable TV, Inc. v. FCC*²⁹ and *Century Communications Corp. v. FCC*³⁰ and that under those cases digital cable carriage rules would be unconstitutional. To the contrary, as discussed in Section III-A, those cases do not govern the constitutional inquiry. In fact, they and other cases demonstrate that the Commission has the authority to adopt cable carriage rules in the absence of a specific factual record where development of such a record is not possible and the rules are based on reasonable predictive judgments that ultimately prove to be well-founded.

In *Quincy*, the court considered a constitutional challenge to the must-carry rules that the Commission adopted in the mid-1960s in response to concerns that the growing cable industry posed a threat to the viability of local broadcasting. Although the

²⁹ 768 F.2d 1434 (D.C. Cir. 1985).

³⁰ 835 F.2d 292 (D.C. Cir. 1987).

court struck down the rules on the ground that the Commission had not put forth sufficient factual evidence to show that the must-carry rules were necessary to protect the local broadcast service, the court expressly stated that the Commission's regulations were appropriate at their adoption and only became constitutionally suspect after time passed and the Commission failed to review the facts and test the predictive judgments that supported the initial adoption of the rules:

When the FCC first asserted jurisdiction 20 years ago, the cable industry was in its infancy and its impact on local broadcasting could not be gauged with accuracy. *In that context*, courts faced with nonconstitutional claims concerning the breadth of the FCC's jurisdiction *consistently and appropriately deferred to the Commission's admittedly speculative fears* that the advent of cable television would displace local broadcasting. . . . Nearly two decades have now passed, and the Commission has shown itself capable of the most sophisticated analysis of the effects of cable on conventional television. . . . *At some point*, especially where First Amendment rights are at stake, the Commission must do more than ask us to defer to its "more or less intuitive model" and "collective instinct" to sustain its assertion that a rule is both necessary and important. Where, as here, the Commission itself has expressly acknowledged that its regulatory premises are susceptible of empirical proof, and, in fact, has demanded such proof as a prerequisite of regulation in analogous contexts, we believe that point has passed.³¹

In *Century* the court reaffirmed the principle that development of a factual record is not always a prerequisite to rulemaking.³² Similarly, in *FCC v. National Citizens Committee for Broadcasting*, the Supreme Court rejected an Administrative Procedure Act

³¹ *Quincy*, 768 F.2d at 1458 (emphasis added and internal citations omitted).

³² 835 F.2d at 239 ("At least *in those instances in which both the existence of the problem and the beneficial effects of the agency's response to that problem are concededly susceptible to some empirical demonstration*, the agency must do something more than merely posit the existence of the disease sought to be cured.") (quoting *Quincy*, 768 F.2d at 1455) (emphasis added).

challenge to a regulation that prohibited certain joint broadcast-newspaper ownership combinations but limited the obligation to divest such combinations to only a few egregious situations, holding that because the factual determinations underlying the Commission's decision to "grandfather" most existing combinations were "primarily of a judgmental or predictive nature, . . . complete factual support in the record for the Commission's judgment or prediction [wa]s not possible or required: 'a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'"³³ Thus, the Commission is not foreclosed from adopting regulations governing cable carriage of the new DTV service simply because there is no hard factual record of the DTV experience.

There is as yet no factual record specific to cable carriage of *digital* broadcast signals for the unexceptionable reason that digital television is in its "infancy."³⁴ However, there is abundant evidence, from the analog experience and the Commission's expertise in the complex process of bringing digital television to consumers, that supports the predictive judgment that cable carriage requirements are necessary to encourage the rapid transition to DTV and to sustain local broadcasting through the transition.

When it enacted the *1992 Cable Act's* analog cable carriage requirements, Congress considered both historical evidence that cable operators had denied carriage to local stations and shifted stations in their channel lineups, and more forward-looking

³³ 436 U.S. 775, 813-14 (1978) (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)).

³⁴ See, e.g., *CATA Comments*, at 14-17; *GTE Comments*, at 26-27; *MediaOne Comments*, at 41-45; Comments of C-SPAN Networks, CS Docket No. 98-120, at 9-11 (Oct. 13, 1998) ("*C-SPAN Comments*").

evidence of the cable industry structure that created incentives for continued anti-competitive conduct. As explained in MSTV's opening comments, the latter category included evidence of cable operators' substantial market power, the horizontal concentration and technological advances that increased the importance of advertising revenue to cable operators, and the vertical integration that gives cable operators a financial interest in promoting affiliated programming.³⁵ Based on this evidence, Congress concluded that "the must-carry and channel-positioning provisions in the bill are the only means to protect the federal system of television allocations, and to promote competition in local markets."³⁶ Because this conclusion was based on the characteristics of the cable industry (not the technical characteristics of the broadcast signals transmitted through cable), it and the underlying findings are fully applicable in the digital environment and support the conclusion (embodied in Section 614(b)(4)(B)) that cable carriage requirements should be extended to digital broadcast signals. Indeed, as described in MSTV's opening comments, the market circumstances in which digital broadcast signals will come on the air make the concerns identified in the analog context even *more* compelling in the digital environment.³⁷

The complexities involved in bringing about the digital transition further highlight the need for swift action in adopting digital carriage rules. The Commission has worked for over a decade, considering hundreds of sets of comments and producing multiple rounds of NPRMs, orders, and reconsideration orders, to establish the regulatory framework for the conversion of the nation's local, universally-available broadcast system from analog

³⁵ See *MSTV Comments*, at 45-46.

³⁶ *1992 Cable Act Conference Report*, at 75, *reprinted in* 1992 U.S.C.C.A.N. at 1257.

³⁷ *MSTV Comments*, at 47-50.

to digital. In initiating this process, the Commission recognized that the enormous undertaking of replacing the nation's entire analog television broadcast system with a digital system required a relatively well-developed regulatory structure *before* it began – a structure necessary to rationalize the transition and ensure that scarce spectrum is not utilized inefficiently through a permanent system of dual analog/digital broadcasting.³⁸

Accordingly, throughout this process the Commission has made numerous judgments regarding the implementation of DTV without the benefit of a factual record concerning how the digital service will work, based on its traditional expertise in managing spectrum to ensure that it is utilized in the public interest.

Such a judgment is needed with respect to digital cable carriage rules. As with the digital transition in general, the Commission cannot simply wait and see what happens. Five years from now, if there are no clear cable carriage rules in place, the Commission would face a “factual record” showing that some digital stations have not gone on the air because their markets have been eroded by the importation of distant and duplicative signals; that DTV penetration is extremely low because consumers cannot receive DTV signals over cable and have become frustrated with broadcast/cable incompatibilities (and manufacturers have given up on producing DTV sets for which there is no market); that DTV signals carried by cable are downconverted to standard definition (and consumers are wondering what happened to the much-touted HDTV) because cable operators have been permitted to do so or because broadcasters have been forced to consent to downconversion to obtain carriage; and that overall program quality has declined because

³⁸ Fifth Report and Order, *In re Advanced Television Systems and their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12811-12812 (1997).

investments in DTV have drained broadcasters' resources without returning any meaningful revenue. Based on that "record," the Commission could finally decide that digital cable carriage rules are necessary to spur the transition and preserve local broadcasting. Or it could be forced to conclude that DTV is a failure and cable carriage rules are not warranted to promote what has turned out to be an unsuccessful experiment. At that point, consumers, broadcasters and others would have expended billions of dollars unnecessarily, and it could be too late to inject new life into the transition.

The time for action on the digital cable carriage rules mandated by Section 614(b)(4)(B) is now. The Commission did not wait to develop a "factual record" to assure itself that digital television would be a viable service before it mandated the transition to digital television. Similarly, it does not need to develop a new factual record (beyond the highly-relevant record developed in the analog context) to complete the process of establishing the regulatory framework to support the DTV mandate.

2. Section 614(b)(4)(B) Authorizes The Commission To Make All Necessary Rule Changes To Ensure That DTV Signals Are Carried On Cable.

Some cable commenters contend that because Section 614(b)(4)(B) appears in a subsection entitled "signal quality," it authorizes the Commission only to prescribe technical standards to preserve the quality of digital signals that are carried on cable systems.³⁹ Although the provision does appear in this subsection, the express terms of the provision do not limit its application only to carriage rules relating to the technical quality of advanced signals. Section 614(b)(4)(B) requires the Commission to make "any" rule

³⁹ See, e.g., *MediaOne Comments*, at 26-27; *Ameritech Comments* at 6-7; *CATA Comments*, at 11-14; *GTE Comments*, at 8-10.

changes necessary to ensure “cable carriage” (not merely technical quality) of advanced signals. Thus, the placement of the provision in the “signal quality” subsection appears merely to reflect Congress’ understanding that changes in the carriage requirements for advanced signals likely would be driven by the technical characteristics of the signals. It does not limit the Commission’s authority with respect to the type of cable carriage requirements it can adopt in this proceeding.

3. Section 614(b)(4)(B) Authorizes The Commission To Adapt The Cable Carriage Rules To DTV Signals To Effectuate The Goals Of The Rules In The Digital Context.

Several cable industry commenters argue that dual carriage of analog and digital signals cannot be required under Section 614(b)(4)(B) because it would conflict with some of the other requirements in Section 614. For example, some commenters argue that mandatory carriage of both digital and analog broadcast signals would be inconsistent with Section 614(b)(5), which provides that cable operators are not required to carry the signals of two stations that “substantially duplicate” each other or are affiliated with the same broadcast network.⁴⁰ Several commenters contend that because Section 614(b)(3) obligates cable operators to carry the “primary video” of local broadcast stations, Congress could not have intended that they be required to carry more than one programming signal.⁴¹ Some further argue that Congress simply could not have contemplated “double” carriage of analog

⁴⁰ See, e.g., *Adelphia Comments*, at 9-10; *GTE Comments*, at 10-12; *MediaOne Comments*, at 27-33; *NCTA Comments*, at 12-14; Comments of BET Holdings II, Inc., CS Docket No. 98-120, at 8-10 (Oct. 13, 1998) (“*BET Comments*”); *Discovery Comments*, at 34-35; Comments of BellSouth Corp./BellSouth Interactive Media Services, Inc., CS Docket No. 98-120, at 17 (Oct. 13, 1998) (“*BellSouth Comments*”).

⁴¹ See, e.g., *Adelphia Comments*, at 8-9; *GTE Comments*, at 10; *NCTA Comments*, at 14-15; *Discovery Comments*, at 35-36.

and digital signals because of the “disruption” it would cause cable operators.⁴² Other commenters cite Section 614(b)(7), which provides that broadcast signals carried on cable must be “viewable” on “all television receivers” connected to the system, and argue that because digital signals will not, absent costly set-top boxes with down-conversion capabilities, be viewable on subscribers’ analog receivers, it would be impossible or prohibitively expensive for cable operators both to carry digital signals and satisfy this requirement.⁴³ Finally, some commenters contend that requiring carriage of both analog and digital signals while retaining the one-third cap on cable capacity that must be devoted to local broadcast signals would produce the “absurd” result of allowing cable operators who reach the one-third cap to drop local analog signals in favor of digital signals that will have a limited audience.⁴⁴

These arguments are unpersuasive. First, the argument that specific analog cable carriage requirements are “poorly suited” to digital broadcast signals,⁴⁵ to the extent it is valid at all, simply demonstrates that Congress was correct in concluding that the Commission would have to make changes in the cable carriage rules to ensure carriage of

⁴² See, e.g., *NCTA Comments*, at 8-9. But see *MSTV Comments*, at 51-56 (proposing a capacity-based must-carry proposal that would minimize such “disruptions”); *NAB Comments*, at 35 (suggesting that Commission could permit small cable systems that have not upgraded or added digital capability to comply more gradually with DTV carriage requirements); Comments of Morgan Murphy Stations and Cosmos Broadcasting Corp., CS Docket No. 98-120, at 12-13 (Oct. 13, 1998) (“*Morgan Murphy/Cosmos Comments*”) (proposing that channel-locked cable systems of less than 750 MHz be permitted to exclude DTV signals from carriage to avoid having to drop existing cable channels).

⁴³ See, e.g., *MediaOne Comments*, at 35-36; *NCTA Comments*, at 15-16; *BellSouth Comments*, at 15.

⁴⁴ See, e.g., *NCTA Comments*, at 15-16; *BellSouth Comments*, at 16-17.

⁴⁵ See *BellSouth Comments*, at 14.

digital broadcast signals “in accordance with the objectives” of Section 614.⁴⁶ The statute does not require the Commission to apply the precise requirements of Section 614 to digital signals. Inconsistencies between the direct application of the existing analog rules to digital signals and the objectives of the statute simply obligate the Commission to make the “changes” called for by the statute; they do not eviscerate the mandate to apply those “objectives” to DTV signals.

Second, not all of the provisions cited are necessarily inconsistent with mandatory carriage of DTV signals. For example, the provision that requires that broadcast signals be “viewable” on all television receivers for which the cable system provides a connection is not inconsistent with a requirement that cable systems carry DTV signals, nor does it require cable operators to down-convert digital signals for viewing on analog sets. In the analog environment, Section 614(b)(7) clearly is intended to apply only to television receivers that are capable of displaying the transmitted signal. That is, if a cable operator provides a subscriber with connections for two analog receivers, and the subscriber owns a NTSC set and a PAL set,⁴⁷ the cable operator clearly does not have to transmit a PAL signal or provide a NTSC-to-PAL converter for the PAL set, despite the fact that signals transmitted through the system obviously would not be “viewable” on the PAL set.

Applying this principle in the digital context, Section 614(b)(7) would not obligate cable

⁴⁶ See *1992 Cable Act Conference Report*, at 67, reprinted in 1992 U.S.C.C.A.N. at 1249. (Section 614(b)(4)(B) requires the Commission “to make *any changes* in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards *in accordance with the objectives of this section.*”) (emphasis added).

⁴⁷ PAL is an analog transmission standard that is used outside the United States and is not compatible with the NTSC system.

operators to render digital signals “viewable” on all subscribers’ analog and digital sets; it would simply require cable operators to deliver digital signals to subscribers so that the signals are viewable on all sets that have the technical capability to display them.

Finally, the argument that Congress cannot have intended “double” carriage of digital and analog signals because it would cause too much disruption to cable service or would produce “absurd” results is fallacious because it presumes an effect that is not compelled by the statute. The extent to which “absurd” results will ensue from, or cable service will be “disrupted” by, digital cable carriage requirements depends on how those requirements are implemented. The legislative history makes clear that Congress called for carriage of digital broadcast signals “in accordance with the objectives” of Section 614 – which include limiting the burden that carriage imposes on cable operators (by, for example, linking carriage obligations to the size of the system and capping the amount of cable capacity that must be dedicated to broadcast stations). Thus, the statute contemplates that the Commission will implement digital carriage requirements during the DTV transition in a manner that reasonably takes account of the burden imposed on cable operators. It is for this reason that MSTV proposed a capacity-based scheme for implementing digital cable carriage requirements in a manner that will satisfy Congress’ dual objectives of ensuring carriage of digital signals and limiting and managing the burden imposed on cable operators.⁴⁸

⁴⁸ See *supra* note 42 (discussing MSTV’s and others’ proposals for implementing DTV cable carriage requirements while minimizing disruption to cable systems).

B. A Flexible, Capacity-Based Must-Carry Scheme Will Advance The Important Governmental Interests At Stake In This Proceeding.

In its initial comments, MSTV proposed a flexible, “capacity-based” digital must-carry scheme designed to ensure (1) that existing cable programming is only displaced when justified by special circumstances, and (2) that cable systems generally can accommodate the carriage of digital broadcast signals as they increase capacity and/or upgrade to digital.⁴⁹ The capacity-based proposal would impose digital carriage obligations tailored to the particular circumstances of each cable system, and would offer protections *in addition to* the one-third statutory capacity cap and small-system exception where appropriate to ensure that cable viewers experience minimal disruption to their service during the DTV transition. At the same time, the proposal would protect the national investment in digital television and the longstanding tradition of local broadcasting by giving consumers reasonably prompt access to local DTV signals.

Briefly, the capacity-based rule generally would require cable systems to carry DTV signals on capacity that was unused as of the date the *Notice of Proposed Rulemaking* was released (July 10, 1998) or that was or is added (whether by additional bandwidth or newly converted digital channels) after July 10, 1998. As under the analog rules, certain “small systems” would be exempt from the carriage requirement and no system would be required to dedicate more than one-third of its total capacity to local broadcast signals, both analog and digital. The general principle would be subject to three exceptions. First, cable systems that already have upgraded and have relatively large capacity (*e.g.*, 750 MHz) would be required to carry eligible DTV signals on or before July

⁴⁹ *MSTV Comments*, at 51-56.

10, 1999 (or as the signals come on the air). Second, with the exception of cable systems qualifying for the “small system” exemption, cable systems that do not increase capacity or offer any digital channels during the transition would not be able to avoid must-carry obligations indefinitely. The Commission could either adopt a date certain (*e.g.*, 2003) by which all non-exempt cable systems would be required to carry DTV signals, or require systems to begin carrying each eligible DTV signal within a set period of time (*e.g.*, 24 months) after the signal goes on the air. Third, cable systems that increase capacity or begin to offer digital services early in the DTV transition would be required to “reserve” channel capacity up to the one-third statutory cap for eligible DTV stations that will come on the air later.⁵⁰ This will protect stations that will initiate DTV service later in the transition, such as emerging networks’ affiliates and other smaller stations, from being locked out of cable carriage.

This proposal is particularly well-suited to advance the goals of this proceeding.⁵¹ The *Notice* states that in this proceeding the Commission seeks to promote the DTV transition and retain the strength and competitiveness of broadcast television while minimizing the disruption and cost to cable subscribers.⁵² The capacity-based must-carry proposal does just that. It guarantees that digital broadcast signals will be carried on cable

⁵⁰ This capacity would be “reserved” in name only, since cable systems would be permitted to use such channels for cable or other programming until the DTV signals come on line.

⁵¹ Of course, other flexible must-carry proposals may do so as well. Morgan Murphy Stations and Cosmos Broadcasting have submitted an interesting implementation proposal. *Morgan Murphy/Cosmos Comments*, at 12-13; *see also NAB Comments*, at 35. MSTV is open-minded as to these and other ways to limit subscriber disruption while complying with the obligation under Section 614(b)(4)(B) to extend must-carry protection to DTV signals.

⁵² Notice of Proposed Rulemaking, *In re Carriage of the Transmissions of Digital Television Broadcast Stations*, Amendments to Part 76 of the Commission’s Rules, CS Docket No. 98-120, 13 FCC Rcd 15092, 15093 (1998) (“*Notice*”).

systems whenever carriage would not unduly burden system capacity, which (in light of the capacity increases that will occur during the course of the transition) provides some certainty to both broadcasters and consumers that cable subscribers will have access to digital signals relatively early in the DTV transition. This will increase consumer incentives to purchase DTV sets and encourage broadcasters to invest in DTV stations and the production of digital programming, which will spur the transition. The capacity-based proposal also ensures that digital broadcast stations will not be unfairly (and anti-competitively) shut out of growing cable capacity as cable operators launch digital upgrades and their own digital programming. By ensuring that cable subscribers have access to DTV signals, the proposal allows digital broadcasters to compete fairly with digital cable programming and other digital cable services, and thus helps to maintain the strength and competitiveness of local broadcasting. On the other hand, the capacity-based proposal would tailor carriage requirements to individual cable systems and allow existing cable programming to be deleted only in special and justifiable circumstances, thus imposing a limited and reasonable burden on cable operators, programmers and subscribers.

III. DTV MUST-CARRY RULES CAN BE IMPLEMENTED CONSTITUTIONALLY.

Several cable commenters challenge the constitutionality of digital must-carry requirements, arguing that such requirements would violate the First Amendment. However, as described above, MSTV and other broadcasters have proposed flexible digital must-carry rules that would serve the important governmental interests underlying the *1992 Cable Act* and this proceeding while imposing only modest burdens on cable operators. Thus, many of the First Amendment objections simply do not apply to must-carry requirements similar to those proposed by MSTV. Other arguments represent overly

restrictive readings of the applicable jurisprudence, while still others are based on incorrect factual presumptions. Accordingly, the First Amendment arguments should not deter the Commission from fulfilling its congressional mandate to apply cable carriage requirements to DTV signals.

Two commenters challenge digital must-carry requirements on Fifth Amendment grounds, arguing that such requirements would be an unconstitutional taking of property without just compensation. The argument is based primarily on a strained reading of the Supreme Court's ruling in *Loretto v. Teleprompter Manhattan CATV Corp.* that attempts to extend the Court's narrow ruling well beyond its bounds. A reasoned analysis of the applicable caselaw shows that digital must-carry rules would not result in an unconstitutional taking of cable operators' property.

A. A Capacity-Based Digital Must-Carry Requirement Would Not Violate The First Amendment.

In their initial comments, MSTV and NAB (among others) explained in detail why digital must-carry requirements are consistent with the First Amendment.⁵³ Here, we briefly reiterate our earlier conclusion and respond to the specific challenges raised by cable commenters.

In *Turner II*, the Supreme Court determined that the 1992 *Cable Act's* analog must-carry requirements are constitutional under the First Amendment, passing the intermediate scrutiny standard applicable to content-neutral restrictions on speech.⁵⁴ Under the intermediate scrutiny standard, a restriction on speech is constitutional if it (1) furthers

⁵³ See *MSTV Comments*, at 44-47; *NAB Comments*, at 42-45 & App. A, at 10-24.

⁵⁴ *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 224-225 (1997) ("*Turner II*").

an important or substantial governmental interest, (2) is unrelated to the suppression of free expression, and (3) restricts speech no more than is essential to the furtherance of the interest. In *Turner II*, the Supreme Court emphasized the deference owed to Congress in its policy judgments, and held that substantial evidence supported Congress' predictive judgment that the must-carry provisions furthered important governmental interests.

The Court determined that the must-carry requirements were designed to serve "three interrelated interests" – (1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming.⁵⁵ As MSTV and other commenters explained in their initial comments, the same important governmental interests will be served by digital must-carry requirements. Indeed, the digital service is in every way more vulnerable to anticompetitive cable practices than the analog service was in 1992.

Some cable competitors argue that an analysis of the constitutionality of digital cable carriage rules should be governed by *Quincy Cable TV, Inc. v. FCC*⁵⁶ and *Century Communications Corp. v. FCC*⁵⁷ because the rules would be promulgated not pursuant to a Congressional directive but on the Commission's initiative, and thus would be entitled to less deference than the Court accorded Congress in the *Turner II* decision.⁵⁸ This

⁵⁵ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner I*"); *Turner II*, 520 U.S. at 189.

⁵⁶ 768 F.2d 1434 (D.C. Cir. 1985).

⁵⁷ 835 F.2d 292 (D.C. Cir. 1987).

⁵⁸ See, e.g., *TCI Comments*, at 6-8; *Discovery Comments*, at 14-16; *GTE Comments*, at 25-27. See *Turner II*, 520 U.S. at 218-219 (stating that determination of whether Congress' predictive judgments are supported by substantial evidence is based on "a standard more deferential than we accord to judgments of an administrative agency").

argument can be readily dismissed in light of the discussion above of Section 614(b)(4)(B), which directs the Commission to make the necessary changes in the rules to ensure carriage of digital broadcast signals. Congress' conclusion that cable carriage should be extended to digital broadcast signals was based on the factual record and predictive judgments underlying the analog must-carry rules enacted in the *1992 Cable Act* and upheld in *Turner II*, and is entitled to the same level of deference. Moreover, as discussed in detail in Section II-A-1 above, to the extent that the Commission takes into account (as it should) the additional governmental interest in promoting the rapid transition to digital television as it adopts digital cable carriage requirements, *Quincy* and *Century* show that the Commission can rely on its predictive judgment, in the absence of the information necessary to compile a factual record specific to the digital service, to support the adoption of digital cable carriage rules.

1. Cable Carriage Of Digital Signals Is Essential To Preserve The Benefits Of Free Broadcasting Services.

Cable industry commenters argue that, for various reasons, a digital cable carriage requirement would violate the First Amendment because it would restrict more speech than necessary to advance the government's interests. They propose a number of alternatives that they claim will adequately address the government's concerns. These must be rejected because, as Congress concluded in 1992 and the Supreme Court affirmed in 1997, the market dynamics and incentives in the video programming market are such that proposals that fall short of a substantial carriage requirement are insufficient to advance Congress' interests in promoting fair competition and preserving free broadcasting and the widespread availability of a multiplicity of sources of information.

a) The Monopolistic Market Power Of Cable Operators Precludes A "Marketplace" Solution For Digital Cable Carriage.

Several cable industry commenters insist that the governmental interest in promoting the DTV transition would be best served if the Commission left cable carriage of digital broadcasting signals to the market, contrary to the determinations and directives of Congress.⁵⁹ However, if digital cable carriage is left to the marketplace, a significant portion of consumers will be shut out of the digital transition as cable operators exercise their tremendous market power to restrict access to DTV signals. As discussed above in Section I-A, Congress' determination in the *1992 Cable Act* that market conditions necessitated government intervention to ensure cable carriage of local broadcast signals is applicable, and indeed more compelling, in the digital context, and accordingly forecloses the argument that DTV signals should be left to fend for themselves in the video programming marketplace. Moreover, as noted above and in MSTV's initial comments, the "marketplace" for digital broadcast services is far from unregulated and cannot support the mandated digital transition without the must-carry component.

In upholding the analog must-carry regime in *Turner II*, the Supreme Court determined that Congress' policy judgment that must-carry requirements are necessary to protect the local broadcasting system was based on substantial evidence that cable systems had significant and increasing incentives to deny carriage to, or reposition, local broadcast stations in favor of cable programming. The Court cited evidence (1) that cable operators held market power in most communities, controlling the delivery of video programming

⁵⁹ See, e.g., *MediaOne Comments*, at 16-20; *NCTA Comments*, at 39-40; *GTE Comments*, at 4-5; *CATA Comments*, at 31.

services to approximately 60 percent of television households; and (2) that the increasing importance of advertising revenue to cable operators and the increasing vertical integration in the cable industry gave cable operators a financial incentive to favor affiliated cable programmers over local broadcasters. Because these market conditions and anti-competitive incentives continue to exist and are amplified in the digital environment,⁶⁰ this evidence clearly supports Congress' conclusion in Section 614(b)(4)(B) that carriage requirements should be extended to digital broadcast signals.

Since Congress enacted the *1992 Cable Act*, cable operators have increased their control over broadcast television viewers, and now control the delivery of video programming services to nearly 70% of U.S. households (85% of the market for multichannel video programming). The cable industry continues to be characterized by a high level of vertical and horizontal integration.⁶¹ And in the digital context, cable operators' incentives to exclude, degrade or otherwise discriminate against broadcasters' signals are exacerbated because DTV signals can compete with cable on many new technical fronts. For example, broadcasters' digital programming and services may be technically

⁶⁰ The *HBO/TBS Comments* suggest that market conditions differ in the digital context because consumers can obtain digital programming through alternative MVPDs, principally direct broadcast satellite (DBS) services. *HBO/TBS Comments*, at 19-21. HBO/TBS argues that such MVPDs are growing and eager to provide local signals. But the fact is that these competing MVPDs generally do not provide local service, and as a result cable still controls about 85% of the MVPD market. Thus, it remains beyond dispute that cable systems continue to hold monopoly power in the MVPD marketplace, and competition from other MVPDs cannot, at least at this point, justify ignoring Congress' mandate and refusing to impose a digital must-carry requirement on cable operators.

⁶¹ Fourth Annual Report, In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 13 FCC Rcd 1034, 1044, 1049-1050 (1998) (*"Fourth Annual Report"*). The recently-adopted *Fifth Annual Report* also notes that broadcasters are direct competitors with cable and other MVPDs in the advertising and programming acquisition markets. Fifth Annual Report, In re Annual Assessment of the
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